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No._____

In the Supreme Court of the United States

CLAIM OF DAVID P. KAWCZYNSKI, GERALD G. WINTER, AND MICHAEL KAWCZYNSKI

Petitioners

v.

ESTATE OF ROBERT E. CUMMINGS, Deceased

Respondent

On Petition for a Writ of Certiorari to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IS THE statutory scheme of the Probate Act of Illinois repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution, because the Notice - Publication section requirement (755 ILCS Sec. 5/18-3) is totally abrogated by the Limitation on Payment of Claims section (755 ILCS Sec. 5/18-12) disallowing a Claim for a property interest without the estate's providing any Notice or Publication, denying creditors due process protections set forth in *Tulsa v. Professional Collection Services, Inc. v. Pope,* 108 S.Ct. 1340, 485 U.S. 478 (1988)?

LIST OF PARTIES
AND
Rule 29.6 Statement

All parties appear in the caption of the case on the cover page.

Pursuant to Supreme Court Rule 29.6, petitioners state that it has no parent companies or nonwholly owned subsidiaries.

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of the 14th Amendment — 3, 6, 7, 8, 9, 10, 11

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Supreme Court of Illinois denied the petitioners' Petition for Leave to Appeal to the Supreme Court on December 3, 2003, and appears at Appendix B, and is unpublished.

The Supreme Court of Illinois denied the Petitioners' Motion for Leave to File a Motion for Reconsideration of the Order Denying Petition for Leave to Appeal on January 8, 2004, and appears at Appendix B, and is unpublished.

The Order of the Appellate Court of Illinois affirmed the Trial Court on September 5, 2003, and appears at Appendix B, and is unpublished.

The Order of the Trial Court dismissed the Claim of Petitioners on August 22, 2002, stating the claim was barred by Probate Act of Illinois, 755 ILCS Sec. 5/18-12(b), and appears at Appendix B, and is unpublished.

The Order of the Trial Court denying the Motion of Respondent to dismiss the Claim of Petitioners and allowing the Claim of Petitioners on July 19, 2002, and appears at Appendix B, and is unpublished.

JURISDICTION

The date on which the highest state court decided the case was December 3, 2003, when the Illinois Supreme Court denied the Petitioners' Petition for Leave to Appeal to the Illinois Supreme Court. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Probate Act of State of Illinois

755 ILCS Sec. 5/18-3 **Notice- -Publication**

755 ILCS Sec. 5/18-12 **Limitations on payment of claims**

Constitution of the United States of America

Due Process Clause of the 14th Amendment

STATEMENT OF THE CASE

On July 18, 1996, the Petitioners filed a personal injury lawsuit in the Law Division of the Circuit Court of Cook County, Illinois, against Robert E. Cummings (R. C46-50). In Petitioners' personal injury lawsuit, Cummings was at all times represented by attorneys. Said case is still pending.

On January 12, 2000, Cummings died testate (R. C2-3). On January 26, 2001, the wife of Cummings filed in the Circuit Court of Cook County, Illinois a Petition for Probate of Will and for Letters Testamentary (R. C8). On January 26, 2001, the trial court entered an order admitting the will to probate and appointing Cynthia Cummings, the wife of decedent and Marquette National Bank as Co-Independent Executors (R. C4).

The Illinois probate statute, 755 ILCS Sec. 5/18-3 (Appendix A) in effect at the time, required, made it a duty of the Co-Independent Executors to give actual notice of the opening of the estate and the time for filing claims against it, to all reasonably ascertainable creditors, and to additionally give general notice by publication. The Co-Independent Executors did not give any notice to any creditors, either by actual notice or publication.

Cummings had an asbestos lawsuit pending in the Law Division, Circuit Court of Cook County, Illinois, which after Cummings' death had been amended to read Estate of Robert E. Cummings, Deceased as plaintiff. That lawsuit on August 30, 2001, received a settlement of $1,650,000.00; 40% of the total net settlement, $430,320.00, was allocated to the Survival Action and the proceeds paid to Marquette

National Bank in its capacity as Co-Executor for the Estate of Robert Cummings, to be accounted *for and administered in the Probate Division as with any other Estate*. The Court stated in that Estate of Cummings lawsuit that it recognized *"that a distribution to the legatees under the Will would be inappropriate at this time as there are various debts outstanding, which must be paid prior to any distribution to the legatees"* (R. C40) (Highlighting added) The Co-Independent Executors of the Estate of Cummings did not take any steps whatsoever to publish for claims or give notice to known or reasonably ascertainable creditors pursuant to Sec. 5/18-3 of the Illinois Probate Act.

In Petitioners' personal injury lawsuit Cummings' attorneys continued to file pleadings on behalf of Cummings as though he were alive from 1996 through to April 16, 2002, the date when said attorneys spread the death of record of Cummings, 27 months after Cummings died (R. C108-109).

Immediately on the same date of April 16, 2002, Petitioners filed the pleading Amended Complaint at Law substituting for defendant Robert E. Cummings the defendants Cynthia Cummings and Marquette National Bank Co-Independent Executors of the Estate of Robert E. Cummings, individually. (R. C46-50).

Immediately on the same date April 16, 2002, Petitioners filed the pleading Claim in the Probate matter. The document sets forth that the claimants have a claim in the Tort Lawsuit- -Court #96 L 8309 (filed July 18, 1996) renumbered to 02 L 4592 (R. C44-50).

On May 28, 2002, the executors filed a Motion to Dismiss petitioners' Claim, stating the Claim was not filed

within 2 years of the date of death of Cummings and the claim was barred by the Probate statute 755 ILCS 5/18-12 (Appendix A; R. C55-59). On July 19, 2002, the trial court denied said Motion (Appendix B). On July 24, 2002, the executors filed a Motion for Reconsideration, arguing the same reason (R. C114-138). On August 22, 2002, the trial court reversed its prior ruling and granted the executors' motion to dismiss the Claim, solely on the basis of the 2 year limitation from the date of death of the decedent, the probate statute 755ILCS Sec. 5/18-12(b) (Appendix A; R. C213; RP19-26). The matter proceeded to the Appellate Court of Illinois and said court on September 5, 2003 affirmed the trial court's opinion (Appendix B). The Supreme Court of Illinois denied Petitioners' Petition For Leave To Appeal on December 3, 2003 (Appendix B). The Supreme Court of Illinois denied Petitioners' Motion for Leave To File a Motion for Reconsideration of the Order Denying Petition for Leave to Appeal on January 8, 2004.

Petitioners' claim was disallowed by the trial court on the basis that a claim was barred if it was not filed within two years of the date of the death of decedent. Petitioners argued on the trial level (R. C141-201), carried through the Illinois Appellate level, through the Petition for leave to Appeal on the Illinois Supreme Court level, that this was a denial of due process, as they had been afforded no notice and were being deprived of a property right.

The **Trial Court**, on July 19, 2002, in denying the Motion to Dismiss the claim of claimants, stated: "...this Court finds that the lawsuit filed in the law division is a pending matter. No further claim need be. It was merely

transferred to this Court upon the death of the respondent, defendant, Robert Cummings. And it will be returned to the law division as well. The claim could be filed here..." (RP15-16)

The **Trial Court**, on August 22, 2002, in reversing itself and granting the Motion for Reconsideration to Dismiss, made statements:

> **"...I agonized over it. I tried to do equity and ... I went through this many, many times**... This is a statutory proceeding and the Act provides clearly a bar of two years...our section of the Act provides and eliminates any other conduct that will alleviate the two-year statute. Therefore, the claim is denied....So the statute I say says clearly it must be within two years and the filing of the claim in another division does not eliminate the two-year bar..." (RP 22-23) (Highlighting added).

The Appellate Court in the Order of 9/5/03, sets forth:

> **"...While we have serious questions about the practice of failing, either through omission or an affirmative act, to give notice under Sec. 18-3 and spread a death of record in a timely manner**, we must enforce the Probate Act as drafted. As the trial court indicated, "the filing of a claim in another division does not eliminate the two year bar [in Sec. 18-12(b)].' In re Estate of Worrell, 92 Ill.2d 412, 419 (1982) ('[A] suit filed in a different division of the circuit court is not the equivalent of filing in the probate proceeding.') **Harsh as that result may seem under the facts and circumstances of this**

> **case,** we agree with the trial court and find said result inescapable. Out of an understandable desire to have finality in the probate process, the Statute clearly puts an end to the period for the payment of claims "in any event" two years after the death.
>
> Because section 18-12(b) acts as a bar to a claim filed more than two years following the death of a decedent, we need not reach the remaining issues dealing with section 18-3 of the Act and due process thereunder." (Appendix B, pp 10-11) (Highlighting added)

Petitioners are respectfully asking the U.S. Supreme Court to review the judgment of the Illinois State Courts.

REASONS FOR GRANTING THE PETITION

In *Tulsa Professional Collection Services, Inc. V. JoAnne Pope, Executrix of the Estate of H. Pope Everett*, 108 S.Ct. 1340, 485 U.S. 478 (1988), the U.S. Supreme Court found that when state action affects property rights, due process demands that notification be given to the individuals whose rights are to be affected. Prior to the *Tulsa* decision , the U.S. Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 70 S.Ct 652, 339 U.S. 306,314 (1950) and *Mennonite Board of Missions v. Adams*, 103 S.Ct. 2706, 462 U.S. 791 (1983) had expounded this principle stating "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprize interested parties of the pendency of the action and afford them the opportunity to present their objections." *Tulsa* found that the significant action of the state in probate proceedings demands that there be notice given when property rights are affected in accordance with due process protections under the 14th Amendment of the Constitution.

The *Tulsa* court in discussing the type of notice required stated that when a private property interest can be adversely affected by state action, due process generally requires that the creditor be given actual notice if its identity can be reasonably ascertained by the representative of the estate; this notice should be given by mail or other means so as to ensure actual notice. If the executor is unable to reasonably ascertain the identity of the interested parties, publication by mail can be had.

After the *Tulsa* decision the Illinois legislature

amended the Illinois Probate Act to conform to the principles enunciated *i.e.* due process requirement that notice must be provided before a person is deprived of property rights. The Illinois Probate statute states, clearly and succinctly, that the duty of the estate representative is to "mail or deliver to each creditor of the decedent whose name and address are known to or are reasonably ascertainable by the representative a notice stating the death of the decedent, the name and address of the representative and his attorney of record, a notice that claims may be filed on or before the date stated in the notice. The Illinois Probate statute also provides that it is the duty of the representative of the estate to publish notice in a newspaper in the county where the estate is being administered for three successive weeks. The representative is required, under the statute to file a proof of publication with the clerk of the court 755 ILCS Sec. 5/18-3.

In the facts before the court, Cummings died testate on January 12, 2000. On January 26, 2001, Cummings will was filed in court; an estate was opened; Cynthia Cummings (wife of decedent) and the Marquette National Bank became co-independent executors; Letters Testamentary were issued by the Probate court. The executors of the Estate of Cummings were duty bound under the Illinois statute to give notice to individuals who had a property interest that could be affected by the proceedings. Petitioners are such parties who were entitled to notice, as Petitioners have a long standing cause of action pending in the Circuit Court of Cook County, Illinois against the decedent. The court in *Logan V. Zimmerman Brush Co.*, 102 S.Ct.1148, 1154, 455 U.S. 422, (1982) stated: " A cause of action is a species of property

protected by the Fourteenth Amendment's Due Process". Therefore Petitioners had a property interest that would be affected by the Probate proceedings and were entitled to notice in accordance with the aforementioned statute.

IT IS UNDISPUTED THAT THE REPRESENTATIVES OF THE ESTATE OF CUMMINGS GAVE NO NOTICE TO PETITIONERS, NOR ANY OTHER POTENTIAL CREDITORS EITHER ACTUAL OR BY PUBLICATION. ignoring the duties required under the Illinois Probate statute.

On April 16, 2002 (2 ½ years) after the death of the decedent, Decedent's death was suggested of record in petitioners' personal injury lawsuit. It was then that Petitioners learned of the death of decedent. This was the first knowledge Petitioners had of Cummings' death. Petitioners immediately amended their complaint to add the estate as a party defendant and filed the claim against the estate in the probate proceedings. A Motion to Dismiss was filed by the estate representative, citing The Probate Act of Illinois § 5/18-12 (b) which states: "Unless sooner barred ...all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent..." (Appendix A)

The Illinois lower court ultimately barred this claim and the Illinois Appellate court affirmed on the basis that the 2 year bar is absolute to any claim that has not been filed within two years of the death of decedent. The court did not address the lack of due process issue relating to the co-executors's failure to give notice and Petitioners' wrongfully

being deprived of a property right. The Appellate Court on September 5, 2003, stated: "Because 18-12(b) acts as a bar to a claim filed more than two years following the death of a decedent, we need not reach the remaining issues dealing with section 18-3 of the Act and due process thereunder" (Appendix B, p. 11)

The court in enforcing the 2 year bar and failing to consider the due process questions posed by the Petitioner completely abrogated the due process protection of 755 ILCS Sec. 5/18-3 which had been legislated to afford the due process protection demanded in the *Tulsa* decision and to which Petitioners were entitled. The court in applying a 2 year statute of limitations without inquiry into whether the estate had fulfilled its responsibility to give notice, deprives the Petitioners of property rights without due process and leaves the Petitioners with no remedy.

The Illinois Appellate Court, in the order of September 5, 2003, expressed reservations about the practice of allowing executors of estates to have claims barred without having provided notice to those whose property rights could be adversely affected: "While we have serious questions about the practice of failing, either through omission or an affirmative act, to give notice under section 18-3 and spread a death of record in a timely manner, we must enforce the Probate Act as drafted" (Appendix B, p.10)

The desire of the state to have finality in the probate process is reasonable but such interest should not override and eliminate due process rights. If the notice requirements of the Illinois Probate Act are ignored, as they were here, the Petitioners are denied their property rights without due

process. And so were other claimants likewise denied. And so will claimants in the future be denied their property rights without due process in the Illinois Probate Division.

The 2 year bar for filing claims in the Illinois Probate matter should not be applied when the estate representatives fail to afford the due process requirements enunciated in *Tulsa* and codified in the Illinois Probate Statute 755 ILCS Sec. 5/18-3 **Notice - Publication.**

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(847) 967-0354

Date: February 24, 2004

APPENDIX A

STATUTES INVOLVED

Probate Act of Illinois

755 ILCS 5/18-3

755 ILCS 5/18-12

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America

The Due Process Clause

of the 14th Amendment

PROBATE ACT OF ILLINOIS

755 ILCS Sec. 5/18-3 **Notice—Publication**

§ 18-3 Notice—Publication. (a) It is the duty of the representative to publish once each week for 3 successive weeks, and to mail or deliver to each creditor of the decedent whose name and post office address are known to or are reasonably ascertainable by the representative...a notice stating the death of the decedent, the name and address of the representative and of his attorney of record, that claims may be filed on or before the date stated in the notice, which date shall be not less than 6 months from the date of the first publication or 3 months from the date of mailing or delivery, whichever is later, and that any claim not filed on or before that date is barred.

(b) The published notice under subsection (a) of this Section must be published in a newspaper published in the county where the estate is being administered and may be combined with any notice under Section 6-10 or subsection (b) of Section 9.5. The representative must file proof of publication with the clerk of the court.

755 ILCS Sec. 5/18-12. **Limitations on payment of claims.**

§ 18-12. Limitations on payment of claims.

(a) Every claim against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, is barred as to all of the decedent's estate if:

(1) Notice is given to the claimant as provided in Section 18-3 and the claimant does not file a claim with the

representative or the court on or before the date stated in the notice; or

(2) Notice of disallowance is given to the claimant as provided in Section 18-11 and the claimant does not file a claim with the court on or before the date stated in the notice; or

(3) The claimant or the claimant's address is not known to or reasonably ascertainable by the representative and the claimant does not file a claim with the representative or the court on or before the date stated in the published notice as provided in Section 18-3.

(b) Unless sooner barred under subsection (a) of this Section, all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent...

(d) Except with respect to a claimant whose claim is known to the representative and is not paid or otherwise barred under this Section, a representative who acts in good faith to determine and give notice to creditors of a decedent, as provided in Section 18-3, is not personally liable to a creditor of a decedent, but any claim not barred under this Section may be asserted against (1) the estate, to the extent that assets have not been distributed and (2) a distributee of the estate (other than a creditor), but only to the extent that the distributee's share of the estate will not, in effect, be diminished below what the distributee would have received had the claim been paid by the representative.

CONSTITUTION
OF THE UNITED STATES OF AMERICA

AMENDMENT XIV- -CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

OPINIONS

12/03/03	Order of Supreme Court of Illinois denying Petitioners' Petition for Leave to Appeal to the Supreme Court
01/08/04	Order of Supreme Court of Illinois denying Petitioners' Motion for Leave to File a Motion for Reconsideration of the Order Denying Petition for Leave to Appeal
09/05/03	Order of Appellate Court of Illinois affirming the Trial Court
08/22/03	Order of Trial Court of Circuit Court of Cook County, Illinois dismissing the Claim of Petitioners, stating the claim was barred by the Probate Act of Illinois, 755 ILCS Sec. 5/18-12(b)
07/19/02	Order of Trial Court of Circuit Court of Cook County, Illinois denying the Motion of Respondent to Dismiss the Claim of Petitioners and allowing the Claim of Petitioners

SUPREME COURT OF ILLINOIS
97110 CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 3, 2003

Ms. Christine E. Smith
Attorney at Law
120 W. Madison Street - Suite 725
Chicago, Illinois 60602

Re: 97110 - Estate of Robert E. Cummings, etc,
respondent,
v. Claim of David P. Kawczynski et al.,
petitioners.
Leave to appeal, Appellate Court, First
District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 2003.

SEAL OF THE SUPREME COURT

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

January 8, 2004

Ms. Christine E. Smith
Attorney at Law
120 West Madison Street, Suite 725
Chicago, IL 60602

In re: Estate of Robert E. Cummings, etc., respondent, v. Claim of David P. Kawczynski, et al., petitioners.
No. 97110

Today the following order was entered in the captioned case:

Motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion Denied.

The mandate of this Court shall issue forthwith to the Appellate Court, First District.
Order entered by the Court.

Very truly yours,
/s/Juleann Hornyak
Clerk of the Supreme Court

cc: Mr. Thomas J. Montgomery

Fifth Division
Filed: 09/05/03

No. 1-02-2469

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re Estate of Robert E. Cummings, Deceased Appellee, v. Claim of David P. Kawczynski, Gerald G. Winter, and Michael Kawczynski, Claimants-Appellants.	Appeal from the Circuit Court of Cook County. No. 01 P 440 Honorable Robert Cusack, Judge Presiding.

ORDER

David P. Kawczynski, Gerald G. Winter, and Michael Kawczynski (Claimants collectively) filed a claim in the Estate of Robert E. Cummings, deceased, in the Probate Division of the Circuit Court of Cook County. Following the granting of a motion to dismiss pursuant to section 2-619 of

the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)), having had their claims barred, the claimants filed the instant appeal. For the reasons that follow, we affirm the decision of the trial court.

BACKGROUND

Robert Cummings executed a last will and testament on January 6, 2000. The document nominated Cynthia Cummings and the Marquette National Bank of Chicago as independent executors. The will states that it was signed and dated on "December 6, 2000" [sic]. The attached affidavit of the testator and the witnesses is dated January 6, 2000. The order admitting the will to probate declares that it was dated January 6, 2000.

Cummings was one of the defendants in an action filed in 1996 as 96 L 8309 in the Law Division of the Circuit Court of Cook County (law division case). The law division case stemmed from a fight resulting in an assault and battery outside a tavern that was, at all times relevant, owned by the decedent's corporation. The Claimants in this action filed the law division case against, among other defendants, Robert Cummings, individually and doing business as Ringside Sports Bar & Grill. The dram shop carrier defended under a reservation of rights and defense counsel moved for summary judgment in the law division case. The trial court granted the motion and denied a motion to reconsider. The claimants filed their notice of appeal thereafter.

Cummings died of respiratory arrest resulting from cancer on January 12, 2000, while the appeal of the law division case was pending before this court. Cynthia

Cummings (Cynthia) and the Marquette National Bank, as executors, filed a petition for probate and letters testamentary on January 26, 2001, setting forth that Cummings died leaving a will. At the time of Cummings death, he had no assets other than $1,000 in personalty and an interest in the outcome of pending asbestos litigation. Because he had so little in actual assets, no steps were taken to publish for claims or give notice to known or reasonably ascertainable creditors under §18-3 of the Probate Act. 755 ILCS 5/18-3 (West 2000). No inventory of the estate was filed and the executors made no distributions.

Shortly after the estate was opened, while the appeal of the law division case was still pending before this court, a settlement was reached in the asbestos litigation by which terms $1.65 million was to be distributed. Under the trial court's order, net settlement proceeds of $430,320 were allocated to the survival action to be administered as part of Cummings' probate estate and distributed per the terms of the will. The trial court ratified and approved the settlement.

On February 27, 2002, this court affirmed in part, reversed in part and remanded the law division case back to the trial court. Kawczynski et al. v. Cummings et al., 1-00-0118 (February 27, 2002). The only parties for whom the action was not affirmed were Cummings, CIN, Inc. and Ringside, the tavern out front of which the assault and battery took place. In reversing and remanding as to these defendants, this court found material questions as to whether the innkeeper defendants should have reasonably foreseen that an assault might happen in the parking lot.

On the same date this court issued its modified order in the law division case, the claimants filed an amended law division complaint naming Cynthia and the Marquette Bank and others as defendants. The claimants also filed a claim against the estate based upon the law division action. Cummings death was finally spread of record, after the remand of the law division case, on April 16, 2002. Shortly thereafter, as a consequence of the remand of the law division case and the filing of the probate claims, the attorneys hired by the insurance company to represent Cummings and his corporation withdrew their appearance. They took the position that they no longer needed to provide representation because the dram shop policy provided no coverage for the remaining common law negligence claim. Objections were made along with a motion of the co-independent executors of the estate to dismiss the claims pursuant to section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-619 (West 2000). The estate argued that the claims in the probate action were barred because they were not filed within two years of Cummings' death. The claimants responded to that motion that their claims were timely filed and not barred by the limitations period found in section 18-12 of the Probate Act. 755 ILCS 5/18-12(b) (West 2002). The claimants also argued that, because their personal injury action had been pending in the Circuit Court of Cook County since 1996, the estate could not reasonably claim they were unaware of the claimants and their claims. The claimants further argued that section 18-3 of the Probate Act required the estate to give them actual notice that they completely failed to give. 755

ILCS 5/18-3 (West 2002). The claimants believe section 18-3 establishes an affirmative duty.

The trial court denied those motions on July 19, 2002, relying on case law and the express language of 18-12(b). The trial court indicated that it did not find wrongful conduct on the part of the estate by not publishing. The trial court also indicated that 18-3 did not apply to the case. Accordingly, the trial court ruled that because the law division case had been pending so long, no further claim needed to be filed by the claimants. As a result, the trial court ruled that, for purposes of the two year limitation in section 18-12(b), a timely claim had been established. The trial court also indicated that it had not considered a reply filed by the estate when it made its ruling. The trial court suggested the filing of a motion to reconsider.

The motion to reconsider was filed shortly thereafter. In that motion, the estate directed the court to Illinois Supreme Court precedent standing for the proposition that a lawsuit in another division is not a substitute for the proper filing of a claim against an estate. The estate argued that, while the law division case was pending before this court, the trial court lacked jurisdiction over it. As such, the trial court's ruling in the law division case constituted a final judgment that meant that there was nothing pending before the trial court at the time. After the remand, the trial court was revested with jurisdiction, but that was after the two year limitations period contained in section 18-12(b) had expired. The claimants responded that the failure to spread Cummings' death of record resulted in a tolling of the 18-12(b) limitations period.

On August 22, 2002, the trial court granted the motion for reconsideration. The effect of granting the motion for reconsideration was to bar the claim of the claimants.

ANALYSIS

We begin our analysis by first determining the appropriate standard of review. (735 ILCS 5/2-619(a)(9) (West 2000)). Though the last order of the trial court related to a motion to reconsider, the underlying motion was premised upon section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-619 (West 2000). "Our review of the trial court's order granting [or denying] a dismissal pursuant to section 2-619 of the Code of Civil Procedure involves a pure question of law and is therefore de novo. Antler v. Classic Residence Management Limited Partnership, 315 Ill. App. 3d 259, 263 (2000).

The claimants argue that, because their claim is valid and has been pending since the beginning of the law division action, the trial court should not have granted the motion for reconsideration. The claimants argue there is wrongful conduct in the failures of the independent executors. These alleged failures include not filing an inventory of the estate, not making distributions, and not notifying the creditors and potential creditors of the death. The claimants argue the estate was aware of the claims of the claimants such that the claim filed on April 16, 2002, could not be considered a fresh claim. It is not an unknown claim and is a claim that was in the court system since 1996 and is continuing. The claimants maintain that for over two years from the day he died, attorneys for Cummings continued to appear in the Circuit

Court of Cook County and the Illinois Appellate Court as though the deceased was still alive. The claimants argue that it is clear from the record that there has been no filing of proof of publication, no inventory of the estate and no distribution. Because the estate received money as part of the asbestos litigation, and because there is still an underlying law division action pending on behalf of the estate, the claimants argue they are entitled to recover. The claimants argue the trial court erred when it found no wrongful conduct on the part of the executors. The claimants also argue that the trial court erred in granting the motion to reconsider which resulted in a denial of their claims.

The estate argues that the trial court properly dismissed the claimant's claim because of the relationship between sections 18-3 and 18-12(b). The estate contends that the statutes have to be considered together and that the statute of limitations in 18-3 is shorter than 18-12(b). As a matter of due process, a personal representative must give actual notice of death and the pendency of probate proceedings to all known and reasonably ascertainable creditors under 18-3. The second and longer limitation period indicates that all claims against an estate are barred after two years from the decedent's death regardless of whether notice is given or a probate estate is opened. According to the estate, this limitations period acts as a broad bar to all claims after the expiration of the period. Because of the applicability of this broader limitation period, the arguments about notice and publication are irrelevant. The estate argues that the claimants' lawsuit is not equivalent to the filing of a claim. Had the claimants filed their claim in the

probate court within the two-year period or brought suit against the executors the claim would have been timely, but they did not. The estate points out that, had this court affirmed the grant of summary judgment, there would be no need to advise the court or claimants of the decedent's death. The estate further responds, as to the argument that the underlying lawsuit was still pending before the trial court, that the filing of the notice of appeal divested the trial court of jurisdiction.

Section 18-3, dealing with publication under the Probate Act, reads as follows:

> "(a) It is the duty of the representative to publish once each week for 3 successive weeks, and to mail or deliver to each creditor of the decedent whose name and post office address are known to or are reasonably ascertainable by the representative and whose claim has not been allowed or disallowed as provided in Section 18-11, a notice stating the death of the decedent, the name and address of the representative and of his attorney of record, that claims may be filed on or before the date stated in the notice, which date shall be not less than 6 months from the date of the first publication or 3 months from the date of mailing or delivery, whichever is later, and that any claim not filed on or before that date is barred.
>
> (b) The published notice under subsection

(a) of this Section must be published in a newspaper published in the county where the estate is being administered and may be combined with any notice under Section 6-10 or subsection (b) of Section 9-5. The representative must file proof of publication with the clerk of the court." 755 ILCS 5/18-3 (West 2000).

Section 18-12, dealing with limitations of payments and claims under the Probate Act, reads as follows:

"(a) Every claim against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, is barred as to all of the decedent's estate if:

(1) Notice is given to the claimant as provided in Section 18-3 and the claimant does not file a claim with the representative or the court on or before the date stated in the notice; or

(2) Notice of disallowance is given to the claimant as provided in Section 18-11 and the claimant does not file a claim with the court on or before the date stated in the notice; or

(3) The claimant or claimant's address is not known to or reasonably ascertainable by the representative and the claimant does not file a claim with the representative or the court on or before the date stated in the

published notice as provided in Section 18-3.
(b) Unless sooner barred under subsection (a) of this Section, all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent.
(c) This Section does not bar actions to establish liability of the decedent to the extent the estate is protected by liability insurance.
(d) Except with respect to a claimant whose claim is known to the representative and is not paid or otherwise barred under this Section, a representative who acts in good faith to determine and give notice to creditors of a decedent, as provided in Section 18-3, is not personally liable to a creditor of a decedent, but any claim not barred under this Section may be asserted against (1) the estate, to the extent that assets have not been distributed, and (2) a distributee of the estate (other than a creditor), but only to the extent that the distributee's share of the estate will not, in effect, be diminished below what the distributee would have received had the claim been paid by the representative." 755 ILCS 5/18-12 (West 2000) (emphasis added).

The trial court explained its rationale for reconsidering its ruling on the motion to dismiss as the matter was a "statutory proceeding" that, without regard to the equities in play, "the Act provides clearly a bar of two years." The trial court made specific reference to the case of In re The Estate of Beider, 268 Ill. App. 3d 1094 (1994). Beider explains that "[s]ection 18-12 was adopted for the purpose of facilitating early settlement of estates." Beider, 268 Ill. App. 3d at 1096, citing In re Estate of Hoheiser, 97 Ill. App. 3d 1077, 1080 (1981); see also In re Estate of Garawany, 80 Ill. App. 3d 401 (1980) and Messenger v. Rutherford, 80 Ill. App. 2d 25 (1967). According, to Beider " '[t]he filing of a claim within the period specified by section 18-12 is mandatory.' " Beider, 268 Ill. App. 3d at 1096, quoting Hoheiser, 97 Ill. App. 3d at 1081. As a result, "[a] failure to file a claim within the statutory period is a bar to the claim, even if the executor had personal knowledge of the claim." Beider, 268 Ill. App. 3d at 1096, citing Garawany, 80 Ill. App. 3d at 404. As such, our review is extremely limited because " '[n]o exception to the filing period may be engrafted by judicial decision.' " Beider, 268 Ill. App. 3d at 1096, quoting Hoheiser, 97 Ill. App. 3d at 1081; see also In re Estate of Ito, 50 Ill. App. 3d 817 (1977). " 'A probate court cannot authorize an administrator to pay a claim after the claim has been barred from payment under the statute. To authorize payment under these circumstances would in effect nullify the provision in the statute.' " Beider, 268 Ill. App. 3d at 1096, quoting Messenger, 80 Ill. App. 2d at 29, citing Yaple v. Mahy, 241 Ill. App. 446 (1926).

While we have serious questions about the practice of failing, either through omission or an affirmative act, to give notice under section 18-3 and spread a death of record in a timely manner, we must enforce the Probate Act as drafted. As the trial court indicated, "the filing of a claim in another division does not eliminate the two year bar [in section 18-12(b)]." In re Estate of Worrell, 92 Ill. 2d 412, 419 (1982) ("[A] suit filed in a different division of the circuit court is not the equivalent of filing in the probate proceeding.") Harsh as that result may seem under the facts and circumstances of this case, we agree with the trial court and find said result inescapable. Out of an understandable desire to have finality in the probate process, the Statute clearly puts an end to the period for the payment of claims "in any event" two years after the death.

Because section 18-12(b) acts as a bar to a claim filed more than two years following the death of a decedent, we need not reach the remaining issues dealing with section 18-3 of the Act and due process thereunder.

CONCLUSION

In light of the foregoing, the decision of the trial court is affirmed.

Affirmed.

Reid, J., with Quinn, J. and Hartigan, J., concurring.

In The Circuit Court of Cook County, Illinois

Estate of	) No.	01 P 440
Robert E. Cummings	) Docket	76
Deceased	) Page	433

ORDER

This cause coming on to be heard as a set matter for hearing on the co-executors' Motion For Reconsideration of The Court's Denial of Their 2-619 Motion to Dismiss The Claims filed herein by David T. Kawczynsky, Gerald G. Winter and Michael Kawczynsky, and the court having considered the briefs and arguments submitted in support and in opposition to said motion and being otherwise fully advised in the premises; It is hereby ordered that

1) The Motion for Reconsideration is hereby granted for the reasons stated in open Court and the claim of the claimants filed herein is hereby barred by Sec. 18-12(b) of the Probate Act; and

2) The Court further finds that this is a final and appealable order there being no just reason to delay enforcement or appeal therefrom.

Atty No.: 90533
Name: Stephen A. Snakard
Atty for: Co-Executors
Address: 180 N. LaSalle, Ste. 1400
City/State/Zip: Chicago, IL 60602
Telephone: (312) 726-0355

/Stamp/ ENTERED
AUG. 22, 2002
R. CUSACK - #400

Judge Judge' No.

Dorothy Brown Clerk of The Circuit Court of Cook County, Illinois

In The Circuit Court of Cook County, Illinois

Estate of	) No.	01 P 440
Robert E. Cummings	) Docket	76
Deceased	) Page	433

ORDER

This cause coming on to be heard on the Objection and Section 2-619 Motion of the Co-executors of the Estate of Robert E. Cummings, deceased, to dismiss the the claim filed herein by David P. Kawczynski, Gerald G. Winter and Michael Kawczynski, and the Court having considered the pleadings and arguments of counsel submitted in support and in opposition to said motion, and the Court being otherwise fully advised in the premises.

IT IS HEREBY ORDERED

That the motion to dismiss is denied
for the reasons stated in open Court.

Atty No.: 90533
Name: Stephen A. Snakard
Atty for: Defendants
Address: 180 N. LaSalle, Ste 1400
City/State/Zip: Chicago, IL 60602
Telephone: (312) 726-0355

/Stamp/ ENTERED
JUL 19, 2002
R. CUSACK - #400

Judge Judge' No.

Dorothy Brown Clerk of the Circuit Court of Cook County, Illinois